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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Case No. 2:15-MD-02641-DGC

IN RE: Bard IVC Filters Products Liability
Litigation

**DEFENDANTS C. R. BARD INC. AND
BARD PERIPHERAL VASCULAR
INC.'S MOTION TO STRIKE
PORTIONS OF DR. McMECKING'S
TINLIN RULE 26 REPORT**

(Assigned to the Honorable David G.
Campbell)

(Tinlin Bellwether Case)

The Court ordered the plaintiffs to produce full and complete expert disclosures about common fact and expert issues in the MDL (exclusive of case-specific issues) no later than March 3, 2017. On December 7, 2018, however, the plaintiffs produced a sweeping report of Dr. Robert McMeeking that seems to (1) collect and reiterate certain opinions that were previously disclosed during depositions or reiterate opinions contained

1 in his March 2017 Rule 26 Report about generic issues pertaining to Bard's filters; and (2)
 2 disclose new opinions about common issues concerning the Recovery Filter. Neither
 3 category of opinions concerns Ms. Tinlin, and neither category of opinions should be
 4 permitted. Accordingly, Bard moves to strike the opinions under Rule 37(c)(1) for failure
 5 to comply with Case Management Order No. 8 (Doc. 519) and Rule 26(a)(2)(A)-(C).¹

6 BACKGROUND

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 8 On February 2, 2016, the Court entered Case Management Order No. 8 (Doc. 519),
 9 which set out the sequence of general fact and expert discovery in the MDL. The Court
 10 provided that "Plaintiffs shall provide full and complete expert disclosures as required by
 11 Rule 26(a)(2)(A)-(C) of the Federal Rules of Civil Procedure no later than **December 16,**
 12 **2016.**" (*Id.* at 2.) The Court further ordered that "As stated in the Advisory Committee
 13 Notes to Rule 26 (1993 Amendments), expert reports under Rule 26(a)(2)(B) must set
 14 forth 'the testimony the witness is expected to present during direct examination, together
 15 with the reasons therefor.' Full and complete disclosures of such testimony are required
 16 on the dates set forth above; absent extraordinary circumstances, parties will not be
 17 permitted to supplement expert reports after these dates." (*Id.* at 3.)

18 On October 17, 2016, and at the plaintiffs' request, the Court adjusted the
 19 discovery schedule in Case Management Order No. 18 (Doc. 3685) to allow expert
 20 disclosures to be produced no later than March 3, 2017. The Court further informed the
 21 parties that "expert disclosures on these dates must be full and complete as required by
 22 Rule 26(a)(2)(A)-(C)" (*Id.* at 3.) On March 3, 2017, the plaintiffs produced Dr.
 23 McMeeking's Rule 26 Report on general matters (i.e., not case-specific issues), which Dr.
 24 McMeeking entitled, "Assessment of the Designs of Bard Inferior Vena Cava Filters: The

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 26 ¹ To be clear, Bard is not moving to strike the entirety of Dr. McMeeking's *Tinlin* Report,
 27 attached as Exhibit A. Indeed, his *Tinlin* Report attached as Exhibit A is highlighted to
 28 reflect Dr. McMeeking's actual case specific opinions relating to the filter implanted in
 Ms. Tinlin (although any such opinions might ultimately be objectionable under *Daubert*
 and Rule 702).

1 Recovery, G2, G2 Express, Eclipse, Meridian and Denali Models.” (The “Generic
2 Report,” attached as Exhibit B). Dr. McMeeking’s Generic Report contained 55 single-
3 spaced pages about his generic opinions concerning the Recovery Filter.

4 On December 7, 2018, the *Tinlin* plaintiffs produced another report prepared by Dr.
5 McMeeking, entitled “Report on the Bard Inferior Vena Cava Filter Implanted in Mrs.
6 Debra Tinlin.” (The “*Tinlin* Report”) (Ex. A) The *Tinlin* Report contains general
7 opinions about testing and adverse events associated with the Recovery Filter that fall into
8 one of two categories: (1) the restatement (albeit not identical) of opinions that were
9 previously disclosed during his deposition or that are contained in his Generic Report; and
10 (2) new opinions (not previously disclosed) about common issues concerning the
11 Recovery Filter. Thus, although the *Tinlin* Report is styled as a case-specific Report, Dr.
12 McMeeking does not limit the Report to case-specific opinions. To the contrary, the vast
13 majority of the *Tinlin* Report, starting in the second full paragraph on page 2, constitutes
14 general opinions about the design, testing, failures, and complications of the Recovery
15 Filter wholly unrelated to Ms. Tinlin’s case.

16 **ARGUMENT AND CITATION OF AUTHORITY**

17 Dr. McMeeking’s non-case specific opinions in the *Tinlin* report should be stricken
18 because they violate the Court’s Case Management Orders, Rule 26(a)(2)(A)-(C), and
19 Rule 37(c)(1).²

20 First, in CMO No. 8, the Court explicitly informed the parties that all generic
21 opinions must be disclosed by December 16, 2016 (later amended to March 3, 2017, in
22 CMO No. 18), and that the parties would not be permitted to supplement expert reports
23 absent extraordinary circumstances. No extraordinary circumstances exist here. Nothing
24 prevented Dr. McMeeking from producing the generic portions of his *Tinlin* Report in
25 March 2017. Thus, the plaintiffs should be precluded from offering a supplement/revision
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27 ² In the event the Court does not strike Dr. McMeeking’s general opinions contained in
28 Ex. A, Bard reserves the right to challenge them under *Daubert* and Rule 702.

1 to Dr. McMeeking's Generic Report more than 19 months late under the guise of a case-
 2 specific *Tinlin* Rule 26 Report. To the extent that Dr. McMeeking's *Tinlin* report
 3 "reiterates" or summarizes opinions that previously were disclosed, there are no
 4 "extraordinary circumstances" to allow him to supplement/revise his Generic Report. The
 5 plaintiffs may simply cite to the MDL Report or deposition testimony if Bard raises a non-
 6 disclosure objection at trial. Otherwise, the plaintiffs would unfairly get a second bite at
 7 the apple by re-writing and revising Dr. McMeeking's report to aid them at trial. If the
 8 plaintiffs' approach were proper, then every expert who offered general opinions in March
 9 2017 could revise/supplement their reports to refine their opinions.

10 Second, Rule 37(c)(1) provides that a party's failure to disclose information as
 11 required by Rule 26(a) precludes the party from using that information on a motion, at a
 12 hearing, or at trial unless the failure was substantially justified or is harmless. The Ninth
 13 Circuit has found that Rule 37(c)(1) "gives teeth to [Rule 26's] requirements by
 14 forbidding the use at trial of any information at trial of any information required to be
 15 disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd v. Deckers*
 16 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). The Ninth Circuit further
 17 acknowledged that Rule 37(c)(1)'s sanctions are "self-executing" and "automatic." to
 18 "provide[] a strong inducement for disclosure of material" *Id.* (quoting Fed. R. Civ.
 19 P. 27 Advisory Committee's Note (1993) and affirming exclusion of expert's opinion
 20 even though no explicit court order had been violated and absent bad faith or willfulness).

21 Here, the plaintiffs have no substantial justification for failing to disclose all of Dr.
 22 McMeeking's generic Recovery Filter opinions in March 2017, as required under CMOs 8
 23 and 18. Dr. McMeeking clearly had analyzed and evaluated the Recovery Filter and
 24 discussed his opinions at length in his Generic Report (for over 55 pages). There is simply
 25 no justification for failing to include the newly disclosed opinions at that time. As this
 26 Court found in *Lemon v. Harlem Globetrotters Intern, Inc.*, Nos. CV 04-0299 PHX DGC,
 27 CV 04-1023 PHX DGC, 2006 WL 3499969, at **3-4 (D. Ariz. Dec. 5, 2006), failure to
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1 disclose expert opinions within the time required by the case management orders and with
2 a delay of over one year is grounds for barring the opinions at trial when the opinions
3 could have been timely disclosed. Such is the case with Dr. McMeeking's new and late-
4 disclosed opinions.

5 With respect to general opinions that were in fact previously identified in the MDL
6 report, there is no substantial justification for allowing Dr. McMeeking to clean up or
7 revise his general opinions about the Recovery Filter in the *Tinlin* report. His opinions
8 regarding the Recovery Filter should be those included in the Generic Report as required
9 by the Court, otherwise all of the experts who offered general opinions in March 2017
10 could be "revising" their reports and refining their opinions.

11 To allow Dr. McMeeking to present new general opinions or to revise his prior
12 general opinions is not harmless. Although Bard will cross examine Dr. McMeeking
13 about the new opinions at a deposition,³ Bard cannot have its own experts offer rebuttal
14 generic opinions about the Recovery Filter, or revise their prior reports without likewise
15 violating the Case Management Orders.

16 CONCLUSION

17 For the foregoing reasons Bard respectfully requests that the Court grant the
18 motion to strike. To the extent Dr. McMeeking purports to offer any general opinions
19 about the Recovery Filter at trial, the plaintiffs should be required to rely on properly
20 identified opinions in Dr. McMeeking's Generic Report or his deposition testimony.

21
22 /s/Richard B. North, Jr.

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24 Georgia Bar No. 545599
Matthew B. Lerner

25 ³ If the Court has not issued an order on Bard's motion before Dr. McMeeking's
26 deposition, which is scheduled for January 8, 2019, Bard will be forced to question Dr.
27 McMeeking about his new opinions during the deposition to lessen its prejudice if the
28 Court denies Bard's motion. Bard's questioning of Dr. McMeeking during his deposition
about the substance of his newly disclosed or reiterated opinions, however, should not
have any bearing on Bard's motion.

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